

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

74-1065 B
No. 74-1065

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,
vs.

GENERAL DOUGLAS MacARTHUR, SR. VILLAGE,
INC., STATE OF NEW YORK, COUNTY OF NASSAU,
VILLAGE OF HEMPSTEAD, TOWN OF HEMPSTEAD,
SCHOOL DISTRICT NO. 1, SADIE SCHWARTZ, D. C. R.
HOLDING CORP., HENRIETTA RAND, MARTHA
BARKUS and SHIRLEY HERSHKOWITZ,

Defendants.

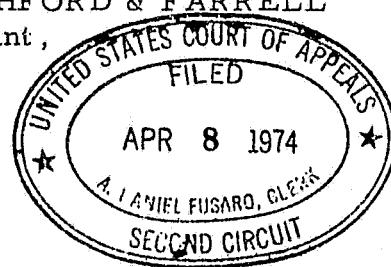
D. C. R. HOLDING CORP., HENRIETTA RAND,
MARTHA BARKUS and SHIRLEY HERSHKOWITZ,
SADIE SCHWARTZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT
D. C. R. HOLDING CORP.

SCHIFFMACHER, CULLEN, ROCHFORD & FARRELL
Attorneys for Defendant -Appellant,
D. C. R. Holding Corp.,
98 Cutter Mill Road
Great Neck, New York 11021
Tel: 516 482-7600



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SR. VILLAGE, INC., STATE OF NEW
YORK, COUNTY OF NASSAU,
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HEMPSTEAD, SCHOOL DISTRICT NO. 1,
SADIE SCHWARTZ, D. C. R. HOLDING
CORP., HENRIETTA RAND, MARTHA
BARKUS and SHIRLEY HERSHKOWITZ,

Index #74-1065

Defendants.

D. C. R. HOLDING CORP., HENRIETTA
RAND, MARTHA BARKUS and SHIRLEY
HERSHKOWITZ, SADIE SCHWARTZ,

AFFIDAVIT OF
SERVICE BY MAIL

Defendants-Appellants.

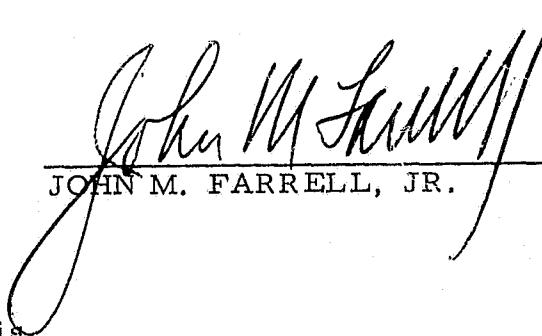
STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

JOHN M. FARRELL, JR., being duly sworn, deposes and
says that deponent is not a party to this action, is over the age of 18 years
and resides at 145 North Woods Road, Manhasset, New York.

That on the 3rd day of April, 1974 deponent served two copies of the
within BRIEF AND APPENDIX of Defendant-Appellant, D. C. R. Holding
Corp., upon Edward John Boyd, V., Esq. United States Attorney, 225
Cadman Plaza, Brooklyn, New York; Joseph Jaspan, Esq., County
Attorney, Nassau County Executive Building, Mineola, New York; Saul
Horowitz, Esq. 250 Fulton Avenue, Hempstead, New York; John O'Shaughnessy,
Hempstead Town Hall, Main Street, Hempstead, New York; Gilbert

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Henoch, Esq. 320 Fulton Avenue, Hempstead, New York; Stanley Beals, Esq. 380 North Broadway, Jericho, New York and Michael P. Gurlides, Esq. 194 Old Country Road, Mineola, New York 11501, the attorneys for the respective parties in this action, these being the addresses designated by said attorneys for that purpose by depositing a true copy of the same enclosed in a post paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office department within the State of New York, at 3:15 P. M.



JOHN M. FARRELL, JR.

Sworn to before me this
3rd day of April, 1974

D. Yvonne Endrikat

D. YVONNE ENDRIKAT
Notary Public State of New York
No. 30-4515346 Nassau County
Comm. Expires March 30, 1975

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BRIEF OF
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D. C. R. HOLDING CORP., HENRIETTA RAND,
MARTHA BARKUS and SHIRLEY HERSHKOWITZ,
SADIE SCHWARTZ,

No. 74-1065

Defendants-Appellants.

THE ISSUE PRESENTED

This appeal is an outgrowth of this Court's decision in
United States v. General Douglas MacArthur Sr. Village, Inc.,
470 Fed. 2nd 675, holding that, under Federal law, a mortgage of
the United States is superior to subsequent local real estate liens,

because "prior in time, prior in right". When the Federal mortgage was held to have priority, the 1969 Village tax lien purchased by DCR Holding Corp. (hereinafter referred to as DCR) became worthless. The question presented by this appeal is whether, under New York law, a municipality is required to refund to a real estate tax lien purchaser, the monies advanced to buy this lien when a municipality cannot convey the liened property to the lien holder after the expiration of the period of redemption.

PRELIMINARY STATEMENT

DCR, a tax sale certificate purchaser from defendant, Village of Hempstead, (hereinafter referred to as the "Village"), appeals from the decision of the Honorable Jack B. Weinstein, Judge of the District Court in and for the Eastern District of New York, and the judgment entered thereon granting the Village's motion for summary judgment dismissing DCR's cross-claim for the refund of \$20,228.11 paid to the Village for the tax sale certificate.

FACTS

On May 4, 1970 DCR received from the Village, a tax sale certificate in the amount of \$20,228.11 representing the unpaid

Village tax lien for the year 1969 on property situated in the Village and owned by General Douglas MacArthur Senior Village, Inc. (hereinafter referred to as "MacArthur") (69). *

This property which was improved with a senior citizens' residence facility built with federal funds, was encumbered with plaintiff's mortgage in the amount of \$1,774,000.00 at the time the 1969 Village tax became a lien. After DCR purchased the tax lien, plaintiff commenced this proceeding to foreclose its mortgage on the ground that MacArthur's failure to pay the Village tax represented by the certificate sold to DCR, as well as Town and School taxes, constituted a default under the terms of plaintiff's note and mortgage. After issue was joined, plaintiff moved for summary judgment contending that its mortgage should be accorded priority over subsequent real estate tax liens, including that of DCR's. The District Court, in granting judgment foreclosing plaintiff's mortgage, held that the local real estate tax liens, including the lien purchased by DCR, were superior to plaintiff's prior recorded mortgage. (See United States v. General Douglas MacArthur Senior Village, Inc., et al 337 F. Supp. 955 (E. D. N. Y. 1972)).

* This and similar references unless otherwise indicated, are to pages in the Appendix.

This Court reversed the judgment of the District Court with respect to the relative priorities of plaintiff's mortgage and the subsequent local real estate tax liens (470 Fed. 2d 675), and remanded for trial the issues raised by defendants-appellants' cross-claims. Certiorari was denied by the United States Supreme Court (County of Nassau, et al v. United States, 412 U.S. 922 (1973)). Meanwhile, MacArthur's property was sold at the foreclosure sale to plaintiff, who bid \$1,630,000.00, leaving a deficiency of \$128,552.76 (59).

The cross-claims of defendants-appellants, including DCR, asserted (a) that the local real estate taxes, including the 1969 Village tax represented by DCR's tax sale certificate, were illegally levied and assessed, because MacArthur's property was entitled to an exemption from such taxation under §420 and §422 of the New York Real Property Tax Law (hereinafter referred to as the "RPTL") and (b, if MacArthur's property were sold and conveyed pursuant to the judgment foreclosing plaintiff's mortgage, the Village would be unable to comply with §1464 of the RPTL requiring the Village, after the expiration of the two year period of redemption,

to deliver to DCR possession and a deed conveying title in fee simple, subject to other municipal and state liens or encumbrances. The Village's inability to comply with the provisions of §1464 RPTL was equivalent to a breach of warranty entitling DCR to a refund of the \$20,228.11 it paid.

DECISION OF THE COURT BELOW

Judge Weinstein in granting the municipalities, including the Village, summary judgment dismissing the cross-claims of DCR and other tax lien purchasers, held that the real estate tax liens of those municipalities, including the Village, purchased by DCR and the other defendants-appellants were valid liens; that there was no warranty of priority made by the taxing authorities to the tax lien purchasers and none could be implied from those provisions of the RPAL and Nassau County Administrative Code controlling tax collection and enforcement procedures so that when plaintiff's mortgage was foreclosed and MacArthur's property sold for less than the balance thereof and the tax liens purchased by DCR and other defendants-appellants became worthless, there was no obligation of the municipalities to refund the monies paid for the tax liens. The District Court's explanation for its decision was that there was no protective statute in New York covering priorities; that at common law all risks in connection with purchases of tax liens were cast upon the purchaser who purchased under the rule of caveat emptor; that tax lien purchasers buy such liens with the possibility of substantial gain or loss and the economic risk inherent is accepted and welcomed by those who purchase such

liens; that defendants-appellants were in a better position than most lien holders, because of the recording of plaintiff's mortgage, to have been forewarned of the possibility of a superior lien; and that the tax sale certificate purchasers took businessman's risks that such liens might be worthless when purchasing them. (71-85)

THE QUESTION INVOLVED

The issue presented in this appeal is whether DCR and other tax lien purchasers are entitled to a refund of the sums they spent to purchase those tax liens. DCR argues that it is entitled to a refund because:

(a) The Village is unable to comply with those provisions of §1464 of the RPTL which provide that a tax sale certificate purchaser, after the period of redemption has expired, is entitled to possession and to a deed conveying title to the liened property in fee simple subject to no encumbrances except those of Village, County or State taxes.

(b) §1464 RPTL is an integral part of the entire tax sale procedure imposing a duty upon the Village which it must meet in order to be entitled to retain the monies the tax sale certificate purchaser paid for the tax lien, and if the Village fails to comply with §1464 RPTL it must refund the money paid for the tax lien.

(c) The foreclosure and sale of MacArthur's property by the Federal Government extinguishing the tax lien purchased by DCR constitutes a supervening impossibility not contemplated by the parties when the tax lien was sold by the Village, which frustrates

not only the particular sale in question but the purpose and intent of the tax sale procedures in general, thus entitling each of the parties to be restored to the position it would have been in if the tax sale had not occurred.

(d) The tax sale procedure which is covered by statute in this State was designed to avoid the vagaries and risks inherent in the common law tax sale procedures and to provide an effective means for the municipality to enforce and collect taxes, by assuring the tax lien purchaser that he would not suffer in the event the lien was invalid or illegal or that there could not be compliance with the underlying statutory obligations imposed upon the municipality.

(e) The mechanics of tax sale procedure makes it practically impossible, and certainly uneconomical, for a prospective tax sale certificate purchaser to conduct, prior to the time he makes his bid, a search of the title to the property upon which he expects to bid to assure himself that there are no superior liens.

PROCEDURE FOLLOWED IN NEW YORK FOR THE
ENFORCEMENT OF DELINQUENT PROPERTY TAXES

Real estate tax collection and enforcement procedure in New York is entirely statutory and has been since 1813 (New York Session Law 1813, Ch. 52).

At present the general provisions covering the enforcement and collection of delinquent taxes are contained in Article 10 RPTL: Village tax enforcement procedure is treated in Article 14 RPTL: and the collection methods undertaken with respect to delinquent real estate taxes in Nassau County are in Article 29 Title B of the Nassau County Administrative Code. All three statutes are essentially similar to each other and follow the concept of the 1813 law.

Title 3 of Article 14 RPTL, to which the Village adhered, when it sold MacArthur's lien to DCR, provides that after receipt of the account of unpaid taxes, the Village Treasurer must publish, once a week for three successive weeks in the official newspaper of the Village, a notice of the tax sale, listing the real property upon which taxes are unpaid, the amount of the tax together with interest and charges, and stating that such real property on a date specified in such notice, subsequent to the expiration of three weeks, will be sold at public auction at a designated place in the Village, which sale shall commence and be completed not more than ten days after the last day of the publication of the notice of sale. (§1452 RPTL)

The tax sale is an auction sale and the Village Treasurer on the date designated sells the lien to the highest bidder. (§1454 RPTL) Although RPTL contains no specific method for auctioning off Village tax liens, in practice the same procedure is used as when a County lien is sold, that is, the lowest interest rate bid wins (See §5-39.0, Nassau County Administrative Code).

Upon payment to the village of his bid price, the tax lien purchaser receives a tax sale certificate. (§1454 RPTL) There follows a two-year period within which the owner, occupant or other person interested in the property, has an opportunity to redeem the same from the lien. (§1456 RPTL) After the period of redemption elapses, the Village has the election of either foreclosing the tax lien (§1458 RPTL) or conveying title by means of a tax deed to the tax sale certificate holder (§1464 RPTL). The latter procedure was followed by defendant Village in this case. This tax deed is given after a notice of redemption in the form prescribed by the statute (§1464 sub. 2 RPTL) has been served and the tax sale certificate holder surrenders the certificate and tenders \$5.00 to the Village for the deed. The deed which the certificate holder receives conveys to him an absolute estate in fee subject only to the claims of the Village, County or State for tax liens or encumbrances. (§1454 sub. 3 RPTL)

The grantee of the tax deed is also entitled to possession of the property and may have any occupants removed by summary proceedings as if the occupants were holdover tenants. (§1464 sub. 5 RPTL)

DCR relies in great measure upon a tax sale procedure which the Village Treasurer must follow as set forth in §1454 RPTL as well as the type of title that §1464 sub. 3 and 5 RPTL prescribes the tax sale certificate holder must receive after the redemption period has expired, in support of its claim for a refund and to refute the Court's contention that a tax lien purchaser is in the best position to ascertain the nature and extent of the liens encumbering the property upon which he proposes to bid.

POINT I

BECAUSE THE VILLAGE CANNOT CONVEY TITLE OR POSSESSION TO MacARTHUR'S PROPERTY AS PRESCRIBED BY §1464 RPTL, IT MUST REFUND DCR'S PAYMENT FOR THE TAX LIEN.

The provisions of §1464 RPTL upon which DCR relies in support of its claim for a refund of the payment it made to the Village for the tax lien it purchased are subdivisions 3 and 5 which, in essence, have been an integral part of every tax collection and enforcement law enacted in New York State since 1813. (See Godfrey: Enforcement of Delinquent Property Taxes in New York, Albany Law Review Vol. 24, p. 271 (1960)). These subdivisions read as follows:

"3. If the real property described in such notice is not redeemed within the time limited, the village treasurer shall, upon written application and the surrender of the certificate of sale together with proof of service by mail of the notice to redeem, or upon application by the board of trustees of the village with such proof of service, execute and deliver to the purchaser or village a conveyance of the real property so sold, the description of which shall include a specific statement of whose title or interest is thereby conveyed, as appears on the record, which conveyance shall vest in the grantee an absolute estate in fee, subject, however, to all claims the village, county or state may have thereon for taxes, liens or encumbrances.

"5. The grantee or his assigns or the village and its assigns, as the case may be, shall be entitled to have and possess the real property conveyed from and after the execution of such conveyance and may cause any occupants thereof to be removed in the same manner and by the same proceedings as in the case

of a tenant holding over without permission of his landlord". (Emphasis Supplied).

By directing the Village to convey title in fee simple to and possession of the liened premises to the tax lien holder, free of all liens and encumbrances excepting those of municipalities and the state, these subdivisions of §1464 RPTL impose an obligation on the Village that it cannot fulfill because plaintiff, through its foreclosure proceeding, acquired the liened premises.

When the Court below summarized tax enforcement procedures in New York, it made no mention of the impact of subdivisions 3 and 5 of §1464 in its decision dismissing DCR's crossclaims. However, one of the most basic and usually applied rules of statutory construction is that effect and meaning must be given if possible, to the entire statute and every part and word thereof.

New York Statutes §98, (McKinney's Consolidated Laws of New York); Blatnick v. Ciancimino, 1 A. D. 2nd 383 (3rd Dept. 1956) aff'd 2 N. Y. 2d 943; Ocean Hill Brownsville Governing Board v. Board of Education of New York, 30 A. D. 2d 447 (2nd Dept. 1968) aff'd 23 N. Y. 2nd 483 (1973).

The conclusion that must be reached from any reasonable construction of delinquent tax enforcement statutes in New York,

including subdivisions 3 and 5 of §1464 RPTL, is that DCR paid for a tax sale certificate that entitled it, after expiration of the redemption period, to title to and possession of the liened property. DCR has not gotten and cannot get this from the Village. In law and in justice, it must have a refund.

POINT II

THE DISTRICT COURT'S REASONS FOR
ITS DECISION ARE AT VARIANCE WITH
THE LAWS OF THE STATE OF NEW YORK.

It is acknowledged by all that New York law governs this matter. Aquilino v. United States, 363 U.S. 509, 80 S.Ct. 1277 (1960); United States v. Brosnan, 363 U.S. 237, 80 S.Ct. 1108 (1960); Exie R. Co. v. Tompkins, 304 U.S. 64 58 S.Ct. 817 (1938). However, since there is no New York law precisely in point, the Court below advanced several general propositions ostensibly supported by analogous New York cases to sustain its conclusions. Neither the conclusions reached nor the law cited confirm the Court's position.

(a) The Question of Lien Validity as Opposed to Lien Priority.

Judge Weinstein distinguished between lien validity and lien priority. This is a recognized, even self-evident, distinction and the very one upon which DCR relies to support its claim for a refund. DCR has never denied that its lien is valid. But, DCR argues, since the lien is valid, it must be assumed to have, under New York law, priority. If not, the Village would not be able to convey to a tax lien purchaser, after the redemption period, title in fee simple to the liened premises. Lee v. Farone, 261 App. Div. 674, (3rd Dept. 1941) aff'd.

288 N. Y. 517.

Article 14 RPTL and its companion laws (Article 10 RPTL and Article 2 of Title B, Nassau County Administrative Code) are designed to protect the lien holder against any eventuality until he acquires title to and possession of the liened premises. As the Court of Appeals of this state held in People ex rel Oakley v. Bleckwenn, 126 N. Y. 310 (1891) at page 316:

" . . . the sale is merely a mode of enforcement of the payment of the assessment. The purchaser ~~at~~ a tax sale has only acquired the lien of the municipality. He is the assignee, in effect, of the assessment lien and is thus protected as to his payment until his inchoate rights are consummated by the execution of his deed or lease."

If the lien is invalid, irregular or erroneous, the lien holder receives a refund (§1464 RPTL). In the event the property is condemned, the lien attaches to the proceeds of condemnation, and when an award is made the real estate lienor, having a superior lien, receives the amount he paid for that lien with interest. In re Nassau County 24 N. Y. 2nd 621 (1969). When the lien is valid it is, under New York law, superior to all other types of liens that could encumber the freehold and serves as a vehicle for the municipality to give the lien holder a new and complete title to the land after the redemption period. Lee v. Farone, supra. Thus, whether valid or invalid, a tax lien purchaser's lien by being fully protected under New York law is accorded priority.

This Court, by holding that plaintiff's mortgage was

superior to DCR's real estate tax lien in United States v. General Douglas MacArthur Sr. Village, Inc. supra, has, by the application of Federal law, invoked the sovereign power of the United States to supersede the sovereign power of the State of New York in its own domain, thereby creating a situation which the legislature in enacting Article 14 as a comprehensive statutory scheme designed to protect the tax lien holder, could not contemplate. Because the State legislature had exempted Federal property from local tax liens in §401 RPTL, it could not be expected to consider that a federal mortgage would be held to be superior to a local real estate lien by the application of the federal law that first in time is first in right. The legislative design behind Article 14 has been, in effect, thwarted by the determination of this Court, an act over which the State legislature had no control and could not protect against. Such a result does not justify altering, as the District Court did, the purpose of Article 14 RPTL to prevent DCR from having the protection that statute was framed to give.

(b) Did the Taxing Authorities Warranty Priority?

Judge Weinstein, quoting from §5-54.0 and §5-68.0 of the Nassau County Administrative Code, inferred that there were no

warranties implied in law that would require the Village and the other municipalities to refund the monies paid by the tax lien holders when their tax liens were rendered worthless as a result of the foreclosure of plaintiff's mortgage, because §1168 and §1464 RPTL as well as §5-54.0 of the Nassau County Administrative Code deal with presumptive evidence of the title of the purchase and validity of the lien, but not priority. The District Court made no reference either to subdivisions 3 or 5 of §1464 RPTL upon which DCR relied to establish an implied statutory warranty covering its lien, or §1020 RPTL and 5-53.0 Nassau County Administrative Code which contain similar implied warranties and insofar as applicable, read as follows:

"§1020. Effect of Conveyance.

1. A conveyance by the county treasurer pursuant to section ten hundred eighteen of this chapter shall vest in the grantee an absolute estate in fee, subject however, to (a) all claims of the county or state for taxes liens or other encumbrances and subject to all easements or rights of way which were in existence at the time of the levy of the tax the non-payment of which resulted in the tax sale, (b) redemption as provided in sections ten hundred twenty-two and ten hundred twenty-four of this chapter and (c) cancellation as hereinafter provided."

"§5-53.0 Conveyance by the county when tax lien is not satisfied,

If such tax lien is not satisfied, the county treasurer shall execute to the holder of such certificate of sale of the tax lien a conveyance of the real estate on which the tax lien has been sold. This conveyance shall vest in the grantee an absolute estate in fee, subject to all claims which the county may have thereon for tax or other liens or encumbrances."

In order for a municipality to convey the title which these sections prescribe, the tax lien purchaser's lien must not only be valid but, as before stated, must have priority.

(c) Do Legislative History, Common Law and the Equities of the Market Place, support the District Court's decision?

The Court below attempts to justify its decision that the municipality can retain the tax lien purchaser's payment for the worthless liens they received by alluding to legislative history, common law and the "equities" of the market place. The District Court first states that "legislative history of these statutes reinforce our conclusion" (80) but refers to no legislative history that does so. It cannot because the point here presented is novel and has engendered no legislative history. The only general conclusion that can be derived from the legislative history referred to by Judge Weinstein (81) is that a tax lien holder is entitled to a refund in every case

where a tax deed is set aside and that it must, therefore, be the intent of the legislature to protect the tax lien holder under all circumstances. No inference can be presumed from the District Court's citations that the only statutory warranty is that of lien validity, because none of the court's authorities exclude, or even comment on, the possibility of the existence of the statutory warranty of priority which, DCR argues, is contained in subdivisions 3 and 5 of §1464 RPTL.

The District Court's allusion to common law as supporting its decision is self-defeating. For if the common law rule - that no protection is afforded a tax lien purchaser who buys the lien at his own risk - still prevailed in New York, Article 14 RPTL is utterly without meaning. The inference must be drawn from the enactment of Article 14 RPTL that its purposes were to correct the inherent defects of the common law which left the tax lien holder completely unprotected.

The "equities of the market place" (82) do not support the District Court's decision. The economic risk accepted by a tax lien purchaser is not whether the lien he purchases is valid, invalid, superior or inferior, but that the property he acquires by

his tax deed after the expiration of the redemption period is worth what he paid for it. This is a very real economic risk. The chances of a tax lien purchaser acquiring a valuable parcel at little cost are remote, for the valuable parcels will be protected, if at all possible, by the owner.

A tax lien purchaser cannot calculate or reduce this possible risk by searching the title to the property as Judge Weinstein suggested. The nature of the tax sale procedure - an auction sale of liens on hundreds, even thousands, of parcels (76) with the highest bid in each case (the lowest interest) acquiring the lien - precludes this possibility. Until the lien is awarded to the successful bidder he has no inkling as to whether he will acquire the lien, so the recording of plaintiff's mortgage, could not act as a signal warning a prospective tax lien purchaser of the risks attendant upon his bid. To impose the obligation upon a tax lien purchaser of searching each one of the hundreds or thousands of parcels with respect to which liens are to be sold, before any bid is made, is patently absurd. In this case, because the priority of plaintiff's mortgage was not conclusively established until this Court's decision, even Judge Weinstein, having decided that DCR's

lien was superior to the Federal mortgage, a search of the title to MacArthur's property would not have assisted DCR.

To say that a tax lien purchaser accepts an economic risk in purchasing a tax lien, perverts the whole concept of Article 14 RPTL, which is to enable the municipality to collect delinquent taxes by having the tax lien purchaser bid on those unpaid liens. Possible profit that may accrue to the lien purchaser by acquisition of the liened premises is incidental to the main purpose of the statute. (See Godfrey: Enforcement of Delinquent Property Taxes in New York, Albany Law Review, Vol. 24, supra. The benefit derived by the municipality from the collection of delinquent taxes through the tax enforcement procedure provided in Article 14 RPTL is far outweighed by the harm that will be sustained, if an element of doubt is created as to the validity, priority and enforceability of the lien which the municipality seeks to sell, for that element of doubt will serve to dry up a source of revenue which hard-pressed municipalities so urgently need in this day of rising costs.

POINT III

THE OBJECTIVES OF THE SALE OF THE
TAX LIEN HAVE BEEN FRUSTRATED BY AN
OCCURRENCE OVER WHICH THE PARTIES HAD
NO CONTROL AND DCR'S MONEY SHOULD BE
REFUNDED.

DCR has not served the notice of redemption required by §1464(3) RPTL as a prerequisite to a conveyance from the Village. To do so would be futile. The foreclosure and sale of MacArthur's property has destroyed any power of the Village to convey any interest in that property, let alone the title required by §1464(3) RPTL. The ability of the Village to convey title to and possession of MacArthur's property was destroyed by a foreclosure proceeding which was beyond the control of the Village, who was the lien seller, and DCR, the lien purchaser, and which was not contemplated by either of the parties when the tax lien was sold. We have presented the classic situation of an unanticipated circumstance frustrating the purposes of the obligations and rights of the Village and DCR arising out of the sale of the 1969 Village Tax Lien, the legal results of which have been described in the Restatement of Contracts, §288 as follows:

§288. Frustration of the Object or Effect of the Contract.

Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault is causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears."

The limitations in New York of the doctrine of frustration have been explained in Volume 10 New York Jurisprudence at §373 of Contracts (page 361):

"The exception relating to performance of a contract rendered impossible by act of the law seems to be confined to cases in which some duly authorized legal action, or some process of law, has made performance physically impossible, or in which the impossibility results from the destruction of the corpus or thing by act of the law, or, generally, the law either directly or indirectly, by legislative enactment or by some court action, in effect abrogates the contract, or excuses performance, or prevents, prohibits, or renders illegal the performance of the act contracted to be performed."

The facts of this case fall squarely within the parameters of the doctrine of frustration as explained above, and the courts of this state have invoked the doctrine in the analogous case of W. K. Ewing Co. v. N. Y. State Teachers Retirement System, 14 A. D. 2d 113, (3rd Dept. 1961) aff'd. 11 N. Y. 2d 749. There, plaintiff had a

contract to service the defendant's mortgage which covered improvements on land, the fee title to which was in the U. S. Thereafter, the Federal Government purchased mortgagor's property and the need to have plaintiff service the mortgage was terminated. Plaintiff sued on its contract and the Court, in granting defendant's motion for summary judgment, held at page 115:

"Defendant made an appropriate agreement with the United States by which the obligation of the mortgage was to be liquidated by the government; but the significant change in the need to service the mortgage was not the result of this implementing agreement; it was due, rather, to the substitution of the United States as the obligee by an act of sovereign power and in pursuant of a public law.

"In our view, the contract for servicing the mortgage was at an end; and it is a fair evaluation of the intention of the parties and by necessary implication, that it was to be at an end in the event of the happening of such a contingency as this. There is implicit in an executory contract of this sort such a continuance of the entities and of the subject matter dealt with as to allow the possibility of performance (Stewart v. Stone, 127 N. Y. 500, 507, 28 N. E. 595, 596, 14 L. R. A. 215; Lorillard v. Clyde, 142 N. Y. 456, 462, 37 N. E. 489, 490, 24 L. R. A. 113)."

To the same effect are Matter of Kramer v. Uchitelle, Inc. 288 N. Y. 467 (1942) and Williston on Contracts, Vol. 5 §1953 (Rev. Ed. 1937); 407 East 61st Garage, Inc. v. Savoy Corp. 23 N. Y. 2d 275, 282 (1968).

When the purposes of a contract have been frustrated by these unforeseen circumstances, the parties are restored to the condition that they were in prior to the time the contract was entered into. New York Jurisprudence, Vol. 10 Contracts, §378 page 370. Accordingly, the Village is required to repay the monies DCR advanced to purchase the tax lien.

C O N C L U S I O N

THE JUDGMENT OF THE DISTRICT COURT
SHOULD BE REVERSED AND DCR SHOULD HAVE A JUDGMENT
DIRECTING THE VILLAGE TO RESTORE THE FUNDS PAID FOR
THE 1969 VILLAGE TAX LIEN, WITH INTEREST.

Respectfully submitted,

SCHIFFMACHER, CULLEN, ROCHFORD & FARRELL
Attorneys for defendant, D. C. R. Holding Corp.

JOHN M. FARRELL, JR.,
of Counsel